**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| **DAVIS L. SHIKLES,** | ) | |
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| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 02-2556-KHV** |
| | ) | |
| **SPRINT/UNITED MANAGEMENT COMPANY,** | ) | |
| | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

## MEMORANDUM AND ORDER

Davis L. Shikles brings an age discrimination claim against Sprint/United Management Company ("Sprint") under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The matter is before the Court on Defendant Sprint/United Management Company's Motion For Summary Judgment (Doc. #68) filed August 8, 2003. For reasons stated below, the Court sustains defendant's motion.

### Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, Okla., 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the non-moving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The non-moving party may not rest on her pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

The Court must view the record in a light most favorable to the party opposing summary judgment. See Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. See Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

**Factual Background**

The following facts are either undisputed or, where disputed, construed in the light most favorable to plaintiff.

Plaintiff Davis L. Shikles was born on July 22, 1941. Shikles was 56 years old when Sprint hired

him in March of 1997, and 60 years old when Sprint terminated his employment five years later, on March 13, 2002. While employed by Sprint, plaintiff was referred to as the "old man." Plaintiff does not recall who called him an old man, the occasions upon which he was called an old man, whether anyone witnessed him being called an old man, the number of times he was called an old man or why he was called an old man. Shikles Deposition at 242-45, Exhibit O to Memorandum In Support Of Defendant's Motion For Summary Judgment ("Memorandum In Support") (Doc. #69) filed August 8, 2003.

**I. Promotional Opportunities At Sprint**

Sprint maintains an internal posting system which announces job openings to employees. Jobs have different titles and job grades. Employees who seek promotions find postings that interest them and express interest through the Job Interest Request ("JIR") process.

Sprint initially hired plaintiff as an Associate Analyst-Billing. While employed at Sprint, plaintiff applied for and received several promotions, including Analyst-Billing, Billing Analyst II, and most recently – on July 31, 2000 – Billing Analyst III.[1] Pretrial Order (Doc. #70) filed August 14, 2003, Stipulation 5. Plaintiff received seven pay raises while employed at Sprint.[2] At the time of his termination, plaintiff worked in Sprint's Billing and Invoices Services ("BIS") group within the Revenue/Financial Services organization.

In the 300 days before plaintiff filed his charge with the Equal Employment Opportunity

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[1] On July 31, 2000, Sprint promoted plaintiff to Billing Analyst III, job grade 74 because "he was the most qualified candidate for the position." McCurdy Deposition at 105, Exhibit 4 to Memorandum In Opposition (Doc. #80). On January 1, 2001, Sprint reclassified this position as Revenue Analyst IV.

[2] Plaintiff initially earned $32,000 per year. He received seven pay raises: April 4, 1998 ($33,299), October 5, 1998 ($35,840), March 27, 1999 ($36,558), February 25, 2000 ($38,579), July 31, 2000 ($41,369), February 25, 2001 ($42,787), and February 24, 2002 ($43,217). Exhibit A Attachment 2 to Pretrial Order (Doc. #70).

Commission ("EEOC"), he submitted requests for 14 vacant positions listed on 12 job postings.[3] Sprint cancelled three of these vacancies. Sprint received many applications for each of the 11 remaining positions. In filling them, Sprint evaluated candidates based on their qualifications and experience for each position, and in accordance with company procedures. At the time that he applied for these positions, plaintiff was at grade level 74. Plaintiff interviewed for one position, but Sprint determined that he was not the most qualified candidate for that or any of the other positions.

The details of each position which plaintiff applied for are as follows:

**A. Project Manager II, North Supply**
Posted on May 3, 2001
Special skills required: System organizational and product knowledge
23 applicants
Successful candidate: Janis Yarnevich
Candidate qualifications: Current North Supply sales project specialist

**B. Manager I, Business Development, Affiliate Relations Group**
Posted on August 2, 2001
Level 77
Special skills required: none listed
28 applicants
Successful candidate: Kristina McFeeters
Candidate qualifications: Level 76 employee with strong retail and sales background

**C. Analyst III, Process, Consumer Processes Group**
Posted on July 11, 2001
Level 75
Special skills required: Research analysis & evaluation of customer solutions contact center processes, policies & systems; management of medium to long term projects
170 applicants
Successful candidate: Shawn Gillum
Candidate qualifications: Level 75 program manager, strong experience in customer care, project manager on electronic billing product cross-functional development team

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[3] One posting listed three vacancies.

**D. Analyst III, Process, Consumer Processes Group**

Posted July 13, 2001
Level 75
Special skills required: Maintenance, research, analysis & evaluation of systems, processes & applications in consumer processes group
39 applicants
Successful candidate: Susan McDonald
Candidate qualifications: Served successfully in project manager role for 3 years, supporting product test team

**E. Project Manager III, Cone Operations, Customer Care**

Posted August 3, 2001
Level 76
Special skills required: Build & maintain effective relationships with business process owners, call center managers, & other key members within Sprint & vendors
55 applicants
Successful candidate: Ray Pereira (took one level downgrade to accept position)
Candidate qualifications: Experience in training development within Customer Care, & in vendor relations, project management & call center operations, including call center start-ups

**F. Senior Process Analyst, Customer Care**

Posted July 25, 2001
Level 76
Special skills required: Proven project management skills, including ability to manage multiple projects of varying size & complexity; ability to organize & lead cross-functional teams
23 applicants
Successful candidate: Janell Stricklan
Candidate qualifications: As business automation manager, she had been responsible for managing client/business unit relationships; held project analyst position in past

**G. Project Manager III, Global Vendor Management (Customer Care)**

Posted August 9, 2001
Level 76
Special skills required: Ability to build & maintain effective relationships with call center managers, business process owners & other key members within Sprint & global vendors
57 applicants
Successful candidate: Diana Carey
Candidate qualifications: Had been successful Project Manager III in vendor management and in operations and staffing

**H. Analyst III, Process, Product & Business Development**

Posted July 10, 2001
Level 75
Special skills required: Work with cross-functional teams on operational issues for product/data support, implementation, enhancement of processes & support of data products
34 applicants
Successful candidate: Patricia Brown
Candidate qualifications: Served as Customer Relations Manager; project-managed large client installations & developed methods & procedures for tracking orders; served as public affairs manager & as inside sales manager

**H. Revenue Consultant V/VI, Billing Strategy, Revenue/Financial Services**

Posted July 24, 2001
Level 76 (one position)
Level 75 (two positions)
Special skills required: Strong understanding of business requirements for "Renaissance" billing system & impacts to existing systems & organizations
19 applicants
Successful candidates: 1) Phillip Lewis; 2) Jason Thompson; 3) Shelby Brown
Candidate qualifications: 1) served in BIS at level 76, participated in early requirements-gathering on Renaissance system; 2) developed training curriculum for Billing Information Management Department and authored numerous methods and procedures documents; 3) represented the Billing Information Management Department in its dealings with Sprint's outside vendor for previous billing system, worked on two billing system releases, had background as a subject-matter expert on major pricing initiatives, such as simplified pricing.

Affidavit Of Suzanne McVey at 4-7, Exhibit A to Memorandum In Support (Doc. #69).[4]

Plaintiff testified that "it seemed apparent that promotions were always given to the younger people immaterial of experience."

## II. Plaintiff's Employment

As noted above, plaintiff initially worked as an Associate Analyst-Billing, where he applied for and

[4] The record does not indicate the ages of the employees selected for each position.

received several promotions. At the time of his termination, plaintiff worked as a Revenue Analyst IV in the BIS group within the Revenue/Financial Services organization. Plaintiff worked in the Renaissance group, which was also part of the Revenue/Financial Services organization, immediately before he worked in BIS.

Throughout plaintiff's career at Sprint, Sprint used a "LINK" performance appraisal system under which employees received annual evaluations. The LINK system had five levels of performance, ranked from "1" (Greatly Exceeds Expectations) to "5" (Unacceptable).[5] Supervisors infrequently awarded the two lowest ratings ("4" or "5"). For example in 2001, only one out of 22 BIS employees evaluated received a "4" and no one received a "5." Of the 22 BIS employees, 21 received a "3" or above. Common Merit Review Summary for Richard Bindel Exhibit H and Exhibit C to Memorandum In Support (Doc. #69). Plaintiff's annual performance reviews always rated him at "3" (Meets Expectations).

In November of 2001, when plaintiff worked in the Renaissance group, Rory Barrett Thomas, a director in the Revenue/Financial Services organization, decided to bring plaintiff and four other employees over to BIS. Brent Daniel, plaintiff's immediate supervisor in the Renaissance group, gave him an interim LINK rating of "Meets Expectations" for April 18 to December 31, 2001. Daniel and Scott Rutherford, another supervisor in the Renaissance Group, discussed plaintiff's performance with their supervisor, Diane McElyea. Together the three did not believe that plaintiff's skills matched the Renaissance group. Specifically, Daniel and Rutherford cited (1) examples of his work that had to be redone, (2) his inability to grasp the concept of development work, (3) inaccurate work on a project involving the methods and

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[5] The record indicates that "3" is "Meets Expectations," but it does not specify the label for "2" or "4."

procedures for price plans under the Renaissance billing system, and (4) his difficulties working in an unstructured environment which required a strong understanding and aptitude for how the Renaissance system worked. McElyea concurred with Daniel's rating of plaintiff. For these reasons, McElyea, Daniel and Rutherford agreed that it was best to move plaintiff out of the Renaissance group.

Thomas believed that plaintiff's experience in billing operations would enable him to successfully fill a vacant position in BIS, so she arranged to have him transferred. Thomas transferred four other employees from the Renaissance group to BIS at the same time: Erma Davis, Kris Owara, Kathy Weston and Lisa Woodward.

**A. Performance Reviews**

Lorrie McCurdy supervised plaintiff when he worked in the tables department in 1997 and when he worked in affiliate billing from 2000 to 2001.[6] She considered him a "team player," but his peers did not view him as a leader. McCurdy Deposition at 108, Exhibit 4 to Memorandum In Opposition (Doc. #80).

Brett Daniel supervised plaintiff from April 18, 2001 to December 17, 2001. During that time, Daniels gave plaintiff his first and second interim reviews for 2001. Daniel Deposition at 62-63, 66-68, Exhibit 3 to Memorandum In Opposition (Doc. #80). In plaintiff's final 2001 LINK review, Daniel noted that "[a]lthough still new to BIS, [plaintiff's] willingness to express concerns and pursue solutions for issues has been a plus for BIS. His lack of key processes and procedures as well as his technical knowledge skills has hindered his progress as a Revenue Analyst IV in BIS. He has shown improvements and the

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[6] The record does not explain the "tables department" or "affiliate billing," and it does not detail plaintiff's career progression.

willingness to learn and adapt to change as a new team member, but he is lacking the necessary skills expected for his level, for example: creating, editing and running Impromptu queries, creation and updating Access databases. I look for Davis to improve in his technical and process management skills in order to perform at the Revenue Analyst IV level." Manager's Comments, Exhibit G to Memorandum In Support (Doc. #69). Daniel did not give plaintiff a verbal or written warning, but gave him constructive feedback on things to improve and counseled him on taking better ownership of things assigned to him and not bringing back questions so often. Daniel Deposition at 65-66.

When plaintiff moved to BIS in late December of 2001, Richard Bindel became his supervisor. Bindel did not have any negative observations of plaintiff, did not meet with plaintiff to discuss his final 2001 LINK review, and does not know what was said to plaintiff in either of his 2001 review meetings.

**B. Alpha Rating System**

In late 2001 and early 2002, Sprint introduced a new performance evaluation system which used an "alpha" rating scale. The alpha system did not effect employees' LINK ratings for 2001. Under the alpha system, department managers rated each employee as M (most effective); H (highly effective); E (effective); I (improvement needed) or S (substantial improvement needed). Exhibits C, I and J to Memorandum In Support (Doc. #69). In selecting the appropriate category, managers looked at the relative performance of all employees in the organization or group. Sprint specified that managers assign ratings in the following manner: 10 per cent M, 20 per cent H, 40 per cent E, 20 per cent I, and 10 per cent S. Exhibit I. Employees who had been hired, promoted or demoted into new positions between September 1, 2001 and February 25, 2002 were designated N because they had not been in position long enough to receive a comprehensive performance evaluation. The N rating did not impact compensation

or become part of the employee's permanent record.

Sprint did not design the alpha system around the thought of down-sizing. Although the Revenue/Financial Services organization department managers determined alpha ratings for their groups in January and February of 2002, the ratings were not part of the LINK review process for 2001. Department managers assigned alpha ratings to Revenue/Financial Services employees before Sprint announced a reduction in force on March 13, 2002. Management referred to these early 2002 ratings as "shadow ratings."

In December of 2001, Human Resources gave Bindel guidelines on shadow ratings. On January 21, 2002, Bindel attended a staff meeting with Thomas and other department managers at which they discussed shadow ratings. Bindel started using the shadow rating system in January of 2002, but the new rating system was not explained to employees until early February of 2002. Bindel assigned an S rating – the lowest shadow rating – to plaintiff, Raci Hayes and Marty Willoughby. Plaintiff did not receive an N rating because even though he was new to BIS, he had previously worked in billing.

**III. Reduction In Force On March 13, 2002**

In early March of 2002, senior management directed the Revenue/Financial Services organization to cut its budget. Initially, directors within that organization, including Thomas, tried to find a way to meet budget requirements by reducing "non-headcount related expenses" such as supplies, training and the use of outside contractors. The directors determined, however, that the required budget cut could only be achieved by cutting jobs. The directors then asked department managers to determine which job functions had to absolutely continue to ensure continued operation of each work group. After making this determination, the managers recommended that a number of jobs be eliminated in each group.

As to the BIS group, Thomas asked Bindel to recommend six or seven jobs for termination. In determining which employees to terminate, Thomas did not give Bindel written guidance, but told him to look at which employees received lower shadow ratings (I or S), individual employee skill sets, job performance, who could best perform the jobs that remained and who could succeed in the reorganized environment. Bindel recommended to Thomas seven employees for termination.[7]

In a memorandum to Thomas, Bindel summarized plaintiff's shortcomings, stating that he did not have the skill set for a Revenue Analyst IV in BIS and that he had to be watched over to keep focused on his job duties.[8] Exhibit E. The particular performance problems which Bindel observed included: (1) relative lack of knowledge of Sprint's "P2K" billing system, reporting tools and other tools compared with co-workers at the same level who performed the same job functions, and (2) plaintiff departed on tangents and did not complete projects.[9] Bindel Deposition at 76-77, Exhibit C to Memorandum In Support (Doc. #69).

On March 13, 2002, Thomas terminated six of those employees: plaintiff (age 60), Raci Hayes (age 32), Danyell Kenny (age 26), John Mandacian (age 29), Morris Willoughby (age 40), and Kathryn Weston

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[7] Plaintiff, Raci Hayes and Marty Willoughby had the lowest rating (S). Thomas changed the shadow rating of Leanna Alexander from an H to an N because she had just been promoted and was therefore too new in the position. Bindel Deposition at 55-56.

[8] Bindel did not look at plaintiff's performance reviews for 1997, 1998, 1999 or 2000.

[9] Thomas also made observations regarding plaintiff and Weston, who had been brought into BIS from another group and terminated on March 13, 2002: "We brought them back into the billing operations world and unfortunately some things had changed . . . since the last time they had been in those functions. Automation had occurred, new methods were in place, and not all of those folks could then function in those roles." Thomas Deposition at 173, Exhibit M in Memorandum In Support (Doc. #69). Thomas specifically observed that plaintiff "just didn't have the skills to succeed there any longer." Id. at 174.

(age 39).[10] Thomas transferred the remaining employee, Rachel Mayer, to fraud management. Nine months later, in December of 2002, Sprint instituted another reduction in force which resulted in the terminations of Kelly Hasky (age 31) and Greg Rogers (age 37).

Plaintiff was the oldest employee (the only Revenue Analyst IV) who was terminated from Revenue/Financial Services on March 13, 2002. Pretrial Order (Doc. # 70) at 5. Plaintiff does not know the identity of the other employees in BIS who were terminated, but he claims that most of them were younger than him.[11] As of March 13, 2002, only two Revenue Analyst IV's in BIS (Sharon Robinson and Kari Knox) had longer tenure with Sprint than plaintiff, and only one (Knox) had a higher salary than plaintiff. Bindel Deposition at 81-82, Exhibit 2 to Memorandum In Opposition (Doc. #80).

Sprint continued to advertise available positions after March 13, 2002 and it allowed terminated employees to apply for the positions. Thirteen terminated employees – five of whom were "40 and older" and eight of whom were younger than 40 – applied for positions after March 13, 2002 but did not receive interviews or job offers. One received an interview but not a job offer. After his termination, plaintiff did not apply for any job opening at Sprint.

## IV. Plaintiff's EEOC Charge

On May 21, 2002, plaintiff filed a charge of discrimination with the EEOC, alleging age

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[10] Eight BIS employees were over age 40 but were not affected by the reduction in force on March 13, 2002: Leanna Alexander (age 45), Mary Jo Bennett (age 42), George Berberick (age 41), Erma Davis (age 42), Lisa Fassett (age 41), Jack Ferris (age 64), Kris Owara (age 43) and Sharon Robinson (age 41). Exhibit A, ¶ 8 and Exhibit D to Memorandum In Support (Doc. #69).

[11] Eleven of the 39 people terminated from the Revenue/Financial Services organization on March 13, 2002 were age 40 and older, and three were 39. Twenty-five were younger than 40.

discrimination.[12] The EEOC assigned the charge to Senior Investigator Michael Katz. In a letter dated June 17, 2002, Katz (1) told plaintiff's counsel that "[t]he information currently available is not sufficient to permit the Commission to determine whether further investigation is appropriate;" (2) requested that plaintiff be made available for an in-depth telephone interview; and (3) warned that if a telephone interview was not conducted within 30 days, Katz would recommend that the EEOC terminate the charge based on plaintiff's failure to cooperate. EEOC Letter Exhibit R to Memorandum In Support (Doc. #69).

Katz initially scheduled an interview with plaintiff for July 10, 2002. Exhibit Q to Memorandum In Support (Doc. #69). On July 2, 2002, Katz wrote to plaintiff's counsel confirming the July 10 interview and asking plaintiff to fax detailed information regarding his claim that he had been denied promotional opportunities.[13] Letter From EEOC To Plaintiff's Counsel, Exhibit S to Memorandum In Support (Doc. #69). Plaintiff did not fax the requested information, but at plaintiff's request, Katz rescheduled the July 10 interview to July 19, 2002. Plaintiff's counsel cancelled the July 19 interview, citing a family conflict. Plaintiff's counsel told Katz that he would call back to reschedule. Exhibit Q to Memorandum In Support (Doc. #69). Katz left telephone messages for plaintiff's counsel on July 22, 25, 29 and August 1, 2002. He also sent a letter to plaintiff's counsel on August 1, 2002.[14] The letter stated that (1) "this . . . will serve as a final reminder that the Commission is still awaiting the rescheduling of an interview with Mr. Shikles;" (2) plaintiff or his counsel had cancelled two previously scheduled interviews; (3) the EEOC needed additional information to make an appropriate decision and alternative dates for plaintiff's interview; and

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[12] Plaintiff did not complain of age discrimination until he filed his charge of discrimination.

[13] Katz sent a courtesy copy of the letter to plaintiff.

[14] Again, Katz sent a courtesy copy of the letter to plaintiff.

(4) said that "if the interview with Mr. Shikles is not conducted **before** August 19, 2002, I will forward the file to my supervisor with a closure recommendation." The letter also reemphasized that before the interview was conducted, plaintiff had to supply information concerning his allegation regarding failure to promote. EEOC Letter To Plaintiff's Counsel, Exhibit T to Memorandum In Support (Doc. #69).

On August 6, Katz rescheduled plaintiff's interview for August 16, 2002 at 10:00 a.m, indicating in his case log that plaintiff's attorney would initiate the interview. On August 16, plaintiff's counsel called Katz to cancel plaintiff's interview, indicating that plaintiff had been called away at the last minute and explaining that the nature of plaintiff's job made it difficult to guarantee his availability.[15] Declaration Of Michael Katz ¶ 10, Exhibit Q to Memorandum In Support (Doc. #69).

On August 20, 2002, the EEOC issued a Dismissal and Notice of Rights to plaintiff, explaining that the EEOC had closed plaintiff's file because "[h]aving been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge." EEOC Dismissal And Notice Of Rights, Exhibit U to Memorandum In Support (Doc. #69).

Plaintiff claims that Sprint discriminated against him on the basis of age by not promoting him and by terminating his employment. Pretrial Order (Doc. #70) at 7. Specifically, plaintiff alleges that Sprint treated him less favorably than similarly situated younger employees, that age was a motivating or determining factor in Sprint's failure to promote him and its decision to terminate his employment, and that

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[15] In late June or July of 2002, plaintiff took a job with International Profit Associates in Buffalo Grove, Illinois. Declaration Of Michael Katz ¶ 15. The record does not indicate what plaintiff's new job was, but explains that it required him to travel frequently. Id.

Sprint's stated reasons for failure to promote and termination are a pretext for age discrimination. Id. at 9-10.

Sprint argues that it is entitled summary judgment on all claims. Specifically, Sprint argues that (1) the Court lacks subject matter jurisdiction because plaintiff did not exhaust administrative remedies before the EEOC; (2) plaintiff has no evidence that Sprint intended to discriminate when it terminated plaintiff's employment, (3) plaintiff cannot establish a prima facie case with regard to his claim of failure to promote; and (4) even if plaintiff could establish a prima facie case, its decisions were legitimate and nondiscriminatory.

## Analysis

### I. Exhaustion Of Administrative Remedies

Defendant argues that because plaintiff failed to cooperate with the EEOC investigation, he has not exhausted his administrative remedies and he is barred from recovery. Memorandum In Support (Doc. #69) at 20-22. Plaintiff responds that summary judgment is inappropriate because he complied with the ADEA by asserting only those claims asserted in his charge of discrimination and filing suit within 90 days of receipt of his right to sue letter. Memorandum In Opposition (Doc. #80) at 25. Plaintiff also excuses his alleged failure to cooperate, stating that the EEOC dismissal resulted from an "unfortunate, but unavoidable scheduling conflict" that arose as a result of his efforts to mitigate his damages by taking a new position.[16] Id. Plaintiff also argues that he exhausted his administrative remedies because the ADEA, unlike

[16] The record indicates that the interview could have been by telephone, and on at least one occasion it was scheduled to be by telephone. Declaration Of Michael Katz ¶ 10, Exhibit Q to Memorandum In Support (Doc. #69).

Title VII, grants him an automatic right to sue 60 days after filing his EEOC charge whether or not he cooperated.

Exhaustion of administrative remedies is a jurisdictional prerequisite to an ADEA action. See Smith v. Bd of County Comm'rs, 96 F. Supp.2d 1177, 1185 (D. Kan. 2000). Generally, plaintiff may not bring an ADEA claim unless it was part of a timely-filed administrative charge for which he has received a right-to-sue letter. Wallace v. Beech Aircraft Corp., 87 F. Supp.2d 1138, 1145-46 (D. Kan. 2000) (citing Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999), cert. denied 528 U.S. 815 (1999)). The ADEA exhaustion requirements are less stringent than those under Title VII, in that an ADEA plaintiff is not required to wait for a right to sue letter before filing suit in federal court.[17] Nonetheless, the ADEA requires that a plaintiff file charges with the EEOC. The exhaustion requirement serves two purposes: to give notice of the alleged violation to the charged party and to give the EEOC an opportunity to conciliate the claim through the administrative process. Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994); Stevens v. Deluxe Fin. Servs., Inc., 199 F. Supp.2d 1128, 1150 (D. Kan. 2002).

Because failure to exhaust administrative remedies is a bar to subject matter jurisdiction, the burden is on plaintiff, as the party seeking federal jurisdiction, to show by competent evidence that he did exhaust. United States v. Hillcrest Health Ctr., Inc., 264 F.3d 1271, 1278 (10th Cir. 2001), cert. denied, 535 U.S. 905 (2002). The Court examines whether a genuine issue of material fact exists regarding plaintiff's alleged

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[17] 29 U.S.C. § 626(d) merely provides that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission."

failure to cooperate and, if not, whether his failure to cooperate requires a finding that he failed to exhaust. See McBride v. Citgo Petroleum Corp., 281 F.3d 1099, 1105 (10th Cir. 2002).

**A. Regulatory Requirement To Cooperate With EEOC**

Title 29 of the Code of Federal Regulations, provides that:

> As part of the Commission's investigation, the Commission may require the person claiming to be aggrieved to provide a statement which includes:
> (1) A statement of each specific harm that the person has suffered and the date on which each harm occurred;
> (2) For each harm, a statement specifying the act, policy or practice which is alleged to be unlawful;
> (3) For each act, policy, or practice alleged to have harmed the person claiming to be aggrieved, a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy or practice is discriminatory.

29 C.F.R. § 1601.15(b). If the person does not cooperate, the EEOC has the authority to dismiss a charge for failure to cooperate under 29 C.F.R. § 1601.18(b):

> Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to § 1601.15(b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, the Commission may dismiss the charge.

Id. The Court may not defer to the EEOC or the complaint investigator's finding with respect to plaintiff's compliance. McBride, 281 F.3d at 1106.

As noted, on May 21, 2002, plaintiff timely filed a charge of age discrimination. The record reflects, and the parties do not dispute, that by letter dated June 17, 2002, the EEOC told plaintiff's counsel that it needed more information to determine whether further investigation was appropriate and asked that plaintiff be made available for an in-depth telephone interview. Katz warned that if a telephone interview

was not conducted within 30 days, he would recommend that the EEOC terminate the charge for failure to cooperate. Plaintiff canceled the interviews which were scheduled between July 10 and August 16, 2002. Katz also asked plaintiff to fax detailed information regarding his failure to promote claim, which plaintiff failed or refused to do.[18] Plaintiff has not submitted any evidence that the EEOC already had the information or did not need the information requested, that it was not entitled to request the information, or that it acted improperly in dismissing his claim for failure to cooperate. Here, the record conclusively reveals that plaintiff did not cooperate with the EEOC at any time after he filed his charge of discrimination.

### B. Whether Failure To Cooperate Requires A Finding That Plaintiff Failed To Exhaust

No Tenth Circuit opinion deals with a plaintiff's duty to cooperate with the EEOC in an ADEA case. Defendant relies on McBride v. Citgo Petroleum Corp., 281 F.3d 1099 (10th Cir. 2002), where plaintiff alleged discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq. 281 F.3d 1099. Defendant also cites Rann v. Chao, 154 F. Supp.2d 61 (D.D.C. 2001), and Green v. Heidelberg, 854 F. Supp. 511 (N.D. Ohio 1994), for the proposition that by failing to cooperate with the EEOC investigation of an ADEA claim, plaintiff has not exhausted his administrative remedies.

In McBride, the district court dismissed plaintiff's ADA claim for lack of subject matter jurisdiction, finding that by failing to cooperate with the EEOC investigation, plaintiff had failed to exhaust administrative remedies. Id. at 1102. The Tenth Circuit affirmed, noting that exhaustion of administrative

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[18] Plaintiff claims that his new job made scheduling conflicts with Katz unavoidable, but does not give any reason for failing to provide the requested information.

remedies is a jurisdictional prerequisite to suit on an ADA claim. It reviewed plaintiff's failure to cooperate as follows:

> [Plaintiff] failed to meet the November 10, 1999 deadline for the return of a signed and dated enclosed copy of the Charge of Discrimination . . . the Charge of Discrimination, enclosed in the requesting letter was not signed, dated, and returned to the EEOC until December 20, 1999. The EEOC dismissed Ms. McBride's claim on December 13, 1999-thirty-three days after the signed and dated Charge of Discrimination was due. A signed and dated copy of the Perfected Charge of Discrimination was apparently never sent to the EEOC. In addition, messages were left with Ms. McBride's counsel without response. Affidavits were apparently requested by the EEOC but never provided. Ms. McBride was informed on November 12, 16, 19, 30, 1999 that the change she had requested to the Charge of Discrimination needed to be discussed. The EEOC informed her that the change she had requested would be self-defeating and would result in the dismissal of her claim. She was given the opportunity to submit rebuttal or additional evidence by December 10, 1999, but did not.

Id. at 1106. Based on this evidence, Tenth Circuit held that the claim was barred for failure to cooperate. Id.

In Rann, a federal employee filed a charge of age discrimination with the Department of Labor Equal Employment Opportunity ("EEO") office. 154 F. Supp.2d at 65. Over a six-month period, the EEO office requested information which he failed to provide. The Department of Labor Civil Rights Center therefore dismissed his complaint for failure to prosecute. Id. The district court initially denied defendant's motion to dismiss for failure to exhaust, so it could fully examine the facts surrounding plaintiff's cooperation. Discovery, however, revealed that plaintiff had no tenable excuse for failure to cooperate. Id. at 66. The court therefore found that plaintiff had failed to exhaust administrative remedies, and granted defendant's motion to dismiss for lack of subject matter jurisdiction. Id.

In Green, plaintiff filed an EEOC charge on May 20, 1993, alleging an ADEA violation. 854 F. Supp. at 512. On May 21, June 4 and June 22, 1993, the EEOC asked plaintiff to provide certain

information regarding his claim. On June 22, 1993, because plaintiff had not responded to its two earlier requests, the EEOC notified his attorney that it would dismiss the charge if plaintiff was not interviewed in 30 days. Id. On September 8, 1993, the EEOC gave plaintiff an additional seven days to be interviewed. On September 21, 1993, the EEOC dismissed plaintiff's charge for failure to cooperate. Id. The district court sustained defendant's motion to dismiss, holding that it lacked subject matter jurisdiction because by failing to cooperate with the EEOC, plaintiff failed to exhaust administrative remedies. Id. at 513.

In Kozlowski, plaintiff alleged discrimination in violation of the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(2).[19] Id. at *1. The district court dismissed plaintiff's Title VII claims because she had not cooperated with the EEOC investigation and had therefore failed to exhaust. It denied defendants' motion to dismiss plaintiff's ADEA claim, holding that "an ADEA complainant should be required to cooperate with the EEOC . . . during its exclusive jurisdiction over the . . . ADEA claim," but that "this exclusive jurisdiction lasts for only 60 days instead of the 180 days for a Title VII claim." Id. at *3. Because it was unclear whether plaintiff's failure to cooperate occurred within the 60-day period, the court held that the ADEA claim was not subject to dismissal.

Here, plaintiff did not cooperate with the EEOC at any time – inside or outside of the 60 days of exclusive jurisdiction. Therefore, as a matter of law, plaintiff has not exhausted his administrative remedies.[20] Allowing plaintiff to proceed with an ADEA claim after failing to cooperate with the EEOC

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[19] Specifically, plaintiff alleged that defendant discriminated against her based on her sex, including passing over her for promotions and raises. Id. at *1.

[20] Plaintiff claims that his new job made scheduling conflicts with Katz unavoidable. As noted, however, plaintiff has the burden of establishing by competent evidence that he exhausted administrative remedies. He cites no authority that excuses his lack of cooperation with the EEOC because of scheduling (continued...)

would thwart the administrative process and turn the EEOC filing requirement into a mere formality. The Court does not believe that this was Congress's intent in drafting the ADEA. See Haggard v. The Standard Register Co., No. Civ.A. 01-2513-CM, 2003 WL 22102133, at *6 (D. Kan. Aug. 1, 2003).[21] Defendant is entitled to summary judgment on this issue.

**II. Age Discrimination**

Even if plaintiff had exhausted administrative remedies, he has raised no questions of material fact regarding his age discrimination claims. The ADEA states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To prevail on his ADEA claim, plaintiff must establish that age was a determining factor in Sprint's decisions. See Greene v. Safeway Stores, Inc., 98 F.3d 554, 557 (10th Cir. 1996) (citing Lucas v. Dover Corp., 857 F.2d 1397, 1400 (10th Cir. 1988)). Plaintiff need not show that age was the sole reason for any adverse employment action, but he must show that age "made the difference" in defendant's decisions. Id. (quoting EEOC v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988)). Plaintiff may meet this burden by direct evidence of age discrimination or by the burden-shifting framework

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[20](...continued)
conflicts and he presents no evidence which indicates that he could not fax information or participate in a telephone interview.

[21] In Haggard, plaintiff filed a charge of age discrimination with the EEOC on October 25, 2000. 2003 WL 22102133, at *5. On July 25, 2001, the EEOC dismissed plaintiff's charge for failure to cooperate. Plaintiff filed suit on October 25, 2001. Defendant sought summary judgment, arguing that plaintiff's ADEA claims were barred because he had not exhausted administrative remedies. Id. at *6. Plaintiff did not dispute the EEOC claim that it had asked plaintiff to provide additional information and that he had failed to respond within 30 days. The Court therefore found that plaintiff had failed to cooperate and had not exhausted administrative remedies, and granted summary judgment. Id.

of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981). See Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1225 (10th Cir. 2000); Wood v. City of Topeka, 17 Fed. Appx. 765, 767-68 (10th Cir. 2001).

As noted, Sprint argues that it is entitled to summary judgment because (1) plaintiff cannot establish that Sprint intended to discriminate when it terminated plaintiff's employment; (2) plaintiff cannot establish a prima facie case regarding his failure to promote claim and (3) even if plaintiff can establish a prima facie case, he cannot establish a genuine issue of material fact as to pretext. Memeorandum In Support (Doc. #69) at 19. Plaintiff argues that the record reveals genuine issues of material fact as to his termination, Memorandum In Opposition (Doc. #80) at 28, 30, but he does not address Sprint's argument with regard to failure to promote. The Court therefore deems that claim abandoned. See Rowland v. Franklin Career Servs., LLC, 272 F. Supp.2d 1188, 1204 (D. Kan. 2003); Merkel v. Leavenworth County Emergency Med. Servs., No. 98-2335-JWL, 2000 WL 127266, at *1 (D. Kan. Jan. 4, 2000). Sprint's motion for summary judgment on plaintiff's claim of failure to promote is therefore sustained.

Under McDonnell Douglas, plaintiff initially bears the burden of production to establish a prima facie case of discrimination. 411 U.S. at 802. If plaintiff establishes a prima facie case, the burden shifts to Sprint to articulate a facially nondiscriminatory reason for its actions. See Reynolds v. Sch. Dist. No. 1, 69 F.3d 1523, 1533 (10th Cir. 1995). If Sprint articulates a legitimate nondiscriminatory reason, the burden shifts back to plaintiff to present evidence from which a reasonable jury might conclude that Sprint's proffered reason is pretextual, that is, "unworthy of belief." Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir. 1998) (quoting Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995)).

### A. Prima Facie Case In Reduction In Force

Generally, to establish a prima facie case of age discrimination in termination from employment, plaintiff must show that (1) he was a member of the protected age group, over age 40; (2) he was performing satisfactorily; (3) defendant terminated his employment; and (4) defendant replaced him with a younger person. BUI v. IBP, Inc., 171 F. Supp.2d 1168, 1173 (D. Kan. 2001), aff'd, 34 Fed. Appx. 653 (10th Cir. 2002). This test has been modified in the reduction in force ("RIF") context because the discharged employee is not always replaced. Thus, courts have modified the fourth element by requiring plaintiff to "produc[e] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Lucas v. Dover Corp., Norris Div., 857 F.2d 1397, 1400 (10th Cir. 1988) (alteration in original) (quoting Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988)).

Sprint contends that plaintiff cannot show the fourth element, evidence of an intent to discriminate. To meet this requirement, plaintiff need not produce evidence that age was a determining factor in Sprint's decision. Beaird, 145 F.3d at 1167.[22] Rather, plaintiff can satisfy the fourth element with evidence that Sprint "fired qualified older employees but retained younger ones in similar positions." Branson, 853 F.2d at 771. In Beaird, the Tenth Circuit explained that the fourth element in a RIF case "should be understood to parallel the fourth element of McDonnell Douglas by eliminating 'lack of vacancy' as a legitimate

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[22] In Beaird, the Tenth Circuit noted that to require plaintiff to produce evidence that age was a determining factor "would effectively fuse the prima facie and pretext steps of McDonnell Douglas and 'obviate[] the central purpose of the McDonnell Douglas method, which is to relieve the plaintiff of the burden of having to uncover what is very difficult to uncover – evidence of discriminatory intent.'" Beaird. 145 F.3d at 1167 (quoting Oxman v. WLS-TV, 846 F.2d 448, 454-55 (7th Cir. 1988)).

nondiscriminatory motive for the employment decision." Beaird, 145 F.3d at 1167. The Tenth Circuit noted that "[o]f course, in a RIF case, the plaintiff cannot actually point to a continuing vacancy because her position has been eliminated. She can, however, point to circumstances that show that the employer could have retained her, but chose instead to retain a younger employee." Id.

Even construed in the light most favorable to plaintiff, the record in this case does not support an inference that Sprint treated younger employees in comparable positions more favorably than plaintiff. Plaintiff asserts that he "necessarily" satisfies the fourth element because he was the oldest person in BIS and the only Revenue Analyst IV terminated in the RIF on March 13, 2002. Memorandum In Opposition (Doc. #80) at 29. Plaintiff, however, points to no evidence that Sprint treated any younger Revenue Analyst IV or BIS employee more favorably than it treated him. Instead, the record indicates that when Sprint decided to do a RIF in its Revenue/Financial Services organization, it evaluated the 22 employees in BIS and terminated six of them, four who were under 40 and two who were 40 or above.[23] Eight of the BIS employees who remained were over age 40 (64, 45, 42, 43, 42, 42, 41 and 41). Thus, the record reveals that Sprint terminated other younger (under 40) BIS employees in the RIF on March 13, 2002 and retained other older (over 40) BIS employees.[24] As a matter of law, plaintiff has not established a prima facie case.

**B. Pretext**

Even if plaintiff could establish a prima facie case, he has not presented sufficient evidence of

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[23] The ages of the terminated employees were 26, 29, 32, 39, 40 and 60.

[24] The record does not reveal any information regarding other Revenue Analyst IV employees.

pretext. Sprint articulates a facially nondiscriminatory reason for its action – that it terminated plaintiff's employment as part of a RIF occasioned by budget cuts in Sprint's Revenue/Financial Services organization. If true, this is a legitimate nondiscriminatory reason. See, e.g., Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1261 (10th Cir. 2001) (courts should not "second guess" employer's business judgment). The burden therefore shifts to plaintiff to demonstrate that Sprint's proffered nondiscriminatory reason is pretextual, that is, "unworthy of belief." Beaird, 145 F.3d at 1165 (quoting Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995)). Plaintiff may show pretext by demonstrating that (1) his termination is inconsistent with Sprint's RIF criteria; (2) Sprint deliberately falsified or manipulated his evaluation under its RIF criteria; or (3) Sprint's alleged RIF is a sham. Beaird, 145 F.3d at 1168.[25]

Plaintiff argues that Sprint's proffered nondiscriminatory reason for termination is pretextual because (1) his written appraisals, like those of numerous younger employees whose jobs were not eliminated, rated his performance as "Meeting Expectations;" (2) Sprint used shadow ratings to determinate which employees to eliminate even though it advised employees that the new rating system would not affect compensation in 2002 or become part of employees' permanent records; (3) Bindel and Thomas gave conflicting testimony regarding the use of shadow ratings in the RIF decisions; (4) Bindel and Thomas used vague and subjective criteria which were not part of plaintiff's previous performance appraisals; (5) Thomas transferred a younger employee, Rachel Mayer, rather than terminating her; (6) Thomas gave one employee an N rating because she had been recently promoted to a new position but did not give plaintiff an N rating even though he recently moved to BIS; (7) plaintiff was the oldest Revenue Analyst IV in BIS and the only

[25] The Tenth Circuit has not foreclosed other methods of demonstrating pretext, but it notes that most plaintiffs' arguments will fit within these categories. See id. at 1168 n.6.

Revenue Analyst IV who was terminated; (8) in July of 2000, plaintiff had been promoted because he was the most qualified applicant; and (9) Sprint did not grant interviews to terminated employees who were over age 40 and who applied for positions after March 13, 2002. Memorandum In Opposition (Doc. #80) at 36-37.

The record indicates that all of plaintiff's performance appraisals rated him as "Meeting Expectations," and that in 2001, 21 of the 22 employees in BIS had received a rating of "Meeting Expectations" or better. Thus, to determine which employees to terminate as part of the RIF on March 13, 2002, Sprint had to employ further performance criteria. Standing alone, the fact that plaintiff's performance appraisals rated him as "meeting expectations" does not raise an inference of pretext.

Plaintiff's other allegations, though undisputed, do not create a genuine issue of material fact. These allegations do not suggest that Sprint's proffered nondisciminatory reason is unworthy of belief. Specifically, plaintiff has not demonstrated a genuine issue of material fact whether his termination was inconsistent with the Sprint RIF criteria, whether Sprint deliberately falsified or manipulated his evaluations under the RIF criteria, or whether the alleged RIF was itself a sham. Beaird, 145 F.3d at 1168. Sprint is therefore entitled summary judgment on this issue.

**IT IS THEREFORE ORDERED** that Defendant Sprint/United Management Company's Motion For Summary Judgment (Doc. #68) filed August 8, 2003 be and hereby is **SUSTAINED**.

Dated this 28th day of October, 2003 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge